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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947

No.

IRWIN KOTT, ISRAEL NEEDLEMAN AND HARRY WEINER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Irwin Kott, Israel Needleman and Harry Weiner, respectfully pray that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, in an opinion per Waller, J. filed on October 23, 1947, affirming a judgment of the District Court for the Western District of Louisiana convicting petitioners of a violation of the Emergency Price Control Act of 1942, 56 Stat. 28, as amended, 50 U. S. C. A. App. §§ 904 and 925 and conspiracy to violate the said Act under § 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. A. § 88. Petitioner Kott was sentenced to imprisonment for one year and a day on the conspiracy conviction. Petitioners, Needleman and Weiner, were each sentenced to six months imprisonment and fined $10,000.00 on the conspiracy conviction. Imposition of sentence on the convic-

tions of the substantive offense was suspended and petitioners were all placed on probation for a period of five years to begin at the expiration of the sentence imposed for the conspiracy conviction. Following conviction, petitioners were continued on bail pending disposition of their appeal.

On October 23, 1947, the Circuit Court of Appeals ordered a stay of issuance of mandate for thirty days pending the filing of the petition for *writ of certiorari*, petitioners being continued on bail (R.).

On November 10, 1947, Petition for Rehearing was filed in the Circuit Court of Appeals which was denied on November 19, 1947 (R. 335).

On November 19, 1947, the Circuit Court of Appeals ordered a further stay of issuance of the mandate for thirty days pending the filing of the petition for a *writ of certiorari*, petitioners being continued on bail (R.).

On December 13, 1947, the time for filing petition was extended by your Honorable Court until and including January 18, 1948 and on December 20, the Circuit Court of Appeals further stayed its mandate until January 18, 1948 pending an application to your Honorable Court for a *writ of certiorari*, petitioners being continued on bail (R. 335).

A.

STATEMENT OF THE CASE.

Distillers Factors Corporation is a New Jersey corporation which is duly licensed to wholesale whiskey and other liquors (R. 1030). Petitioner, Harry Weiner, its President (R. 32), is a resident of Jackson Heights, New York (R. 37). Petitioner, Israel Needleman, is employed by Distillers Factors Corporation (R. 32) and is a resident of Brooklyn, New York (R. 31). Petitioner, Irwin Kott, is a resident of the City and State of New York (R. 43).

The single transaction which gave rise to these proceedings is the sale by Distillers Factors Corporation to one Comell John in the name of John's Beverage Company,

of Tallulah, Louisiana (a federally and state licensed liquor dealer (R. 48)) of 356 cases of whiskey at an alleged over-the-ceiling price of $20.00 per case. Prior to trial, petitioners moved to transfer the proceedings to the Southern District of New York and in support thereof filed affidavits disclosing that numerous defense witnesses residing in New York, Massachusettes, Maryland and Illinois would voluntarily testify for the defendants if the trial were held in New York, but would not and could not do so if the trial were held in Louisiana because of the great distances from their homes, and places of business, the time which they would lose from their employments in travel and also the lack of transportation and hotel facilities (R. 31-58). District Judge Dawkins, presiding at the trial denied this motion (R. 61) and also refused to allow an appeal from such denial (R. 61-66). Petitioners' trial began on November 4, 1946 and terminated on November 16, 1946. Appropriate motions for judgment of acquittal were filed by petitioners and overruled by the trial judge (R. 763, 764; 786; 1200).

Since the questions raised in this petition challenge the sufficiency of the Government's evidence to sustain the convictions, the prosecution's proof will be summarized.

Comell John, chief Government witness, is a resident of Vicksburg, Miss. (R. 107). He is in the liquor business there (R. 108) in violation of State law (R. 389). He is also connected with the John's Beverage Company (R. 108), which he says is owned by his wife who acquired it with funds he gave her (R. 238). However, whiskey bought in the name of John's Beverage Company in Louisiana was purchased for his own business, John's Distributing Company, in Mississippi (R. 239-40) and John made all of the over-the-ceiling purchases for John's Beverage Company (R. 108; 341). John, himself, could not obtain a liquor permit in Louisiana since he had committed two federal felonies: selling liquor without paying the federal tax and

defrauding the United States through the purchase of food stamps given to indigent people (R. 285).

Apart from Comell John's "connection" with John's Beverage Company of Tallulah, Louisiana, he was actively engaged in substantial bootleg whiskey dealings in Mississippi, which has a constitutional prohibition against traffic in intoxicating liquors (R. 359). All of these whiskey dealings prior to that here in question were at over-the-ceiling prices or on the "black market" (R. 301).

Entangled in the multifarious ramifications of Mississippi corruption (R. 220; 377) and his numerous black market dealings John was obsessed by the fear of prosecution for violation of the income tax laws (301).

As a result, Comell John turned to agents of the federal Alcohol Tax Unit for a possible solution to his dilemma (R. 301). Accordingly, he entered into an arrangement with the Government agents. John says that he told the Alcohol Tax Unit agents that he would operate in this manner: John's Beverage Company in Louisiana would pay the ceiling price for whiskey and he would personally pay the "side" or over ceiling money (R. 239). He was to work hand in glove with the Alcohol Tax Unit by participating in and helping them "make cases" for black market prosecutions (R. 356). In return John was given "immunity" for "over ceiling and a number of other things" (R. 357).

Clyde D. Pace, another Government witness, and chief Alcohol Tax Unit investigator for the State of Louisiana (644) was one of the federal agents with whom John worked directly in "making cases" (R. 323, 333). Pace was a logical choice since he was a former prohibition agent (R. 689) who was well acquainted with John (R. 689). He had known John some 10 or 15 years prior to the events leading up to this case (R. 689) and indeed had been a visitor at John's home (R. 727). By clear arrangement, understanding and agreement with the Alcohol Tax Unit, Comell John bought large quantities of whiskey, in each case agreeing to pay the seller an over-the-ceiling price. But prior to the

sale and during the negotiations, John *knew* that he would get his money back (R. 304). In each instance it was prearranged that the federal agents who with John were "making the cases" should listen in on telephone conversations (R. 323), eavesdrop by dictaphone (R. 120) and be present during face to face conversations between John and the unwary sellers (R. 125; 126; 305; 662). John was advised as negotiations progressed (R. 137; 138; 326; 659), and the agents stood ready to pounce upon the seller shortly after the pretended over-ceiling money was delivered by John (R. 304). Upon signal by John to the federal agents that he had passed the money, the Government men pounced upon the sellers, arrested them, seized the money and returned it to John in accordance with plans (R. 304). But John was never arrested (R. 319).

At least three other such joint enterprises between the federal agents and John were identified by Government witnesses: The so-called "Cooper-Rudy deal", (R. 255; 303) the "Morton deal" (R. 303) and the "Boston" venture (R. 729). In pursuance of their elaborate plan, $26,000 was returned to John in the *Cooper-Rudy* case and $10,000 in the *Morton* case (R. 258; 304). It does not matter how much was returned to John in the Boston matter.

In short, by July, 1945, before John had ever talked to petitioners, there had been devised and put into operation a set scheme whereby Alcohol Tax Unit agents and Comell John plotted, planned and cooperated in the "making of cases" against whiskey wholesalers based upon asserted violations of the O. P. A. price ceiling regulations.

Then, in July, 1945, John in Vicksburg, Mississippi telephoned the New York City office of Distillers Factors Corporation. He asked for one Hillman and upon being informed that Hillman was not there, he inquired of the person who answered the phone, who, he says, was Kott, the price of whiskey (R. 119). Kott refused to quote prices but indicated that he would negotiate in New York (R. 118). Up to this time, John had never had any whiskey dealings

with Distillers Factors Corporation or with any of the petitioners (R. 298, 299), but, over defense objections, John was permitted to testify that Hillman, asserting he represented Distillers Factors Corporation, had, in April, 1945, offered him whiskey at over-ceiling prices (R. 115). John said he told Hillman he was not "interested" and after Hillman gave him the New York telephone number of Distillers Factors Corporation, John immediately communicated with the Alcohol Tax Unit and repeated his conversations with Hillman (R. 116).

Immediately after his telephone call to New York in July, 1945, John communicated with Farrell, District Supervisor of the Alcohol Tax Unit for the 10th District and thus was born the plot and scheme which in this case, as in the Cooper-Rudy, Paul Morton and Boston "deals" was to result in a purchase of whiskey, allegedly at over-the-ceiling and with cash temporarily delivered by John to an unsuspecting seller. The receiver of the cash was to be pounced upon, arrested, and relieved of the money which the Alcohol Tax Unit agents had agreed was to be returned to John. And the case thus being "made", the Government was to proceed with the prosecutions here involved.

According to plan, Agent Pace was sent to New York with John for the express purpose of "catching" the petitioners (R. 296, 685). Practically, the expedition was under the command of Pace. The Alcohol Tax Unit arranged for hotel accommodations (R. 696). The party, consisting of Pace, John and John's friend Patterson, travelled to New York on the same train, drinking and playing cards together enroute (R. 693), and Pace even carried $5,500 of John's cash (R. 710). Upon arrival, Pace immediately communicated with the New York office of the Alcohol Tax Unit and they sought to wire the rooms for dictaphones, but the rooms were not adaptable for this, so Pace tried to obtain different rooms (R. 120; 696). All of this occurred before John communicated with petitioners—the persons to be "caught" (R. 294).

John then telephoned Distillers Factors Corporation and talked to Kott (R. 120). John cutely claimed he was suffering from a knee injury and would be confined to bed for four or five days (R. 121). Kott replied that while it was contrary to the usual custom of Distillers Factors Corporation to do business in a customer's hotel room, under the circumstances they would do it (R. 121). John testified that Kott, Needleman and Weiner visited him that night and although the sale of whiskey was discussed no deal was made (R. 123). He says that the next day (around 8 or 9 A. M.) Kott visited him "unexpectedly" in his hotel room and discovered Pace. John thereupon introduced Pace as "Mr. Hennigan", John's sales manager (R. 125). Pace was thereafter known as Hennigan to petitioners (R. 305). Negotiations continued. A few days later John and Pace visited Needleman and Weiner at their office (R. 126). It was agreed that Needleman would take John and Pace to the office of United Distillers Corporation at Amston, Connecticut, which was operated by N. Tully Semel, (a co-defendant, who was acquitted (R. 1268)).

Throughout the negotiations, Pace and John worked closely together. Pace accompanied John when he visited the Distillers Factors Corporation office (R. 137). Pace arranged for federal agents to follow John and Pace to Connecticut (R. 142) and Pace impressed Patterson into service as one of his assistants (R. 604-605). Still negotiations continued.

The object of these negotiations was John's obtaining 500 cases of "Meadville" bourbon at over-ceiling prices (R. 125). "Meadville" was whiskey bottled in bond by United Distillers Corporation (R. 129).

The Government introduced two documents which were executed by Comell John. The first, G-2, is an agreement between Distillers Factors Corporation and John's Beverage Company dated August 8, 1945. This was signed "John's Beverage Company, by C. John." Briefly, the parties to G-2 agreed that in consideration of Distillers Factors

Corporation obtaining for John's Beverage Company 500 cases of Meadville bourbon, John's Beverage Company would pay $2.00 per case to Distillers Factors Corporation (R. 47-48). This represented a brokerage charge made by Distillers Factors Corporation which was to be "considered part of the 15% mark-up allowed wholesalers by the O. P. A. and which sum you are to deduct from your 15% mark-up, but is in no way to add to the price of this merchandise to the retailer" (R. 48).

G-5 is an affidavit taken by Comell John on August 10, 1945 in which he stated the terms of the agreement between himself, on behalf of John's Beverage Company, and Distillers Factors Corporation, as set forth above, and in which he swore that no "other considerations" had been promised or paid to Distillers Factors Corporation (R. 184, 185). This John signed only after consultation with, and upon the advice of agent Pace (R. 138; 184-6; 659).

In addition, agreement was reached in New York as to the manner and shipment of the whiskey and payment therefor (R. 168-170). But, difficulty was encountered in getting the 500 cases of whiskey and John refused to pay the purchase price until delivery (R. 149; 672). Pace and John then returned to Louisiana (R. 149; 672). Thereafter, John wired Distillers Factors Corporation from Vicksburg stating he was still "interested" in the whiskey (R. 149).

Needleman in New York telephoned John in Mississippi (R. 150). As a result, Kott was sent to Mississippi (R. 150) and it was finally agreed that Distillers Factors Corporation would arrange for United Distillers Corporation to ship 356 cases of whiskey to John's Beverage Company in Tallulah, Louisiana (R. 150-153). The ceiling price of $37.97 per case was to be paid by letter of credit which was to be sent up to Distillers Factors Corporation and exchanged for a negotiable bill of lading (R. 154). Kott in Mississippi would pick up the brokerage fee of $712. and $7120. in cash representing $20.00 a case over-the-ceiling price (R. 152).

John and the Alcohol Tax Unit agents were now poised for the kill. John reported his success in getting Kott to come down to Mississippi (R. 151). But the federal agents were not completely satisfied. They wanted the money to be paid over in Tallulah "so that the whole transaction could be transacted in Louisiana" (R. 326). John "was advised by the Alcohol Tax Unit to do that" (R. 326). Alcohol Tax Unit agents had "told me (John) previous (sic) that they would rather have it consummated in Tallulah" (R. 332). The agents insisted upon having the money passed in Louisiana so that the arrest, prosecution and trial could be held there (R. 637). This is apparent from the testimony of Barlow, another Alcohol Tax Unit agent who admitted that the scheme to bring Kott into Louisiana for purposes of arrest was devised and plotted by the federal agents on September 6, 1945, fully two days before Kott even arrived in Mississippi (R. 640; 672). Barlow says that on the 6th of September, he "had been informed in the station that there would be a transaction made in Tallulah" (R. 637). And Pace, himself, stated that he was "trying to get this violation down here for trial" (R. 731).

Accordingly, the next day (7th of September) Alcohol Tax Unit agents and John counted out and marked $7120. in cash in Mississippi, wrapped these marked bills in a small package and that night took the money to Tallulah, where it was placed in the safe of John's Beverage Company (R. 677). The agents arranged that John would meet Kott in Mississippi and inveigle him to come to Tallulah, Louisiana (R. 151; 326). John did meet Kott in Mississippi and reported the meeting to the federal agents (R. 164). The next day, John picked up Kott at the Hotel Vicksburg, Vicksburg, Mississippi, and drove him to the John's Beverage Company offices in Tallulah (R. 164). The whiskey had been loaded under a negotiable bill of lading which was being held by Distillers Factors Corporation (R. 459; 463; 482; 484). John gave Kott the money (R. 169). Kott

so informed Needleman by phone, but John refused to permit Kott to leave until confirmation was received that Distillers Factors Corporation had surrendered the bill of lading to the Manufacturers Trust Company in New York against the letter of credit as arranged (R. 169). Such confirmation arrived about noon (R. 169-170).

The scene was now set for the climax of the sordid drama. After learning that the whiskey had been shipped and the bill of lading delivered to his New York agents, John permitted Kott to leave and offered to drive him back to Vicksburg (R. 171). In accordance with well-rehearsed, prearranged plans, John gave the strategically stationed Alcohol Tax Unit agents the signal indicating Kott had the $7120 (R. 172). John and Kott then proceeded to Vicksburg in John's car. They were headed off by the Alcohol Tax Unit agents who arrested Kott, and seized the money (R. 172). John was not arrested (R. 319). Thus, the scheme "engineered" by John and the Alcohol Tax Unit (R. 320) was consummated.

The defense was a complete denial that there was any over-the-ceiling transaction; that Kott was an independent broker and not an agent or employee of Distillers Factors Corporation (R. 1036); that through his obtaining warehouse receipts from the American Distillery Company, which he turned over to Distillers Factors Corporation, Kott had obtained a commitment for approximately 1400 cases of whiskey from Distillers Factors Corporation (R. 1113); that United Distillers, in turn, was obligated to deliver approximately 1446 cases of whiskey to the order of Distillers Factors Corporation (R. 874); that Kott entered into a "deal" with John whereby John was to split with Kott the large profits he would make by selling the whiskey in Mississippi (R. 1067); that Kott was to go to Mississippi to get "his end of it" (R. 1122); that Distillers Factors Corporation was not holding up surrender of the bill of lading pending word from Kott that the money had been paid but that Kott had in fact called in an effort to learn

whether the bill of lading had yet been delivered (R. 1126); and that Needleman retorted sharply to Kott stating that he had already given instructions to deliver the bill of lading and suggesting that Kott "find out what happened to the bill of lading" (R. 1126).

The petitioners, Weiner and Needleman, contradicted John and Pace in many important details, which will not now be alluded to, but some of which will be referred to hereinafter in the section of the brief urging petitioners' right to a new trial.

The learned trial judge in effect directed a verdict of acquittal on the first two counts charging an offer and agreement to sell at over-the-ceiling prices. The jury found petitioners, Kott, Needleman and Weiner, guilty on Counts 3 and 4, charging an offer and agreement to sell. Semel was found not guilty on all counts.

B.
THE QUESTIONS PRESENTED.

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

(1) Was the Emergency Price Control Act of 1942, 56 Stat. 28, as amended, 50 U. S. C. A. App. §§ 904 and 925, which denounces generally as criminal the sale of a commodity in excess of ceiling price, as fixed by regulation thereunder, intended to apply to a seller otherwise innocent where the alleged over ceiling sale is instigated by government agents in league with a purchaser not for use or consumption, and where the pretended over-the-ceiling money is seized by federal agents for return to such purchaser in accordance with previous practice and a prearranged scheme and design of the agents and the purchaser to arrest and punish the seller?

(2) Was the defense of entrapment proved as a matter of law and was judgment of acquittal required where the

government's evidence proved that a whiskey dealer had a continuing agreement that he would work with Alcohol Tax Unit agents in "making" cases against sellers, who would then be prosecuted as price ceiling violators, in return for personal immunity, and, pursuant to said arrangement, petitioners were incited, ensnared and induced to make what they believed were sales at over-the-ceiling prices; especially where, as here, the continuing arrangement was that the over-the-ceiling money be seized by the federal agents immediately upon its delivery to the seller and be by them returned to the purchaser?

(3) Does a trial in the District Court of Louisiana, over petitioners' objection, violate the protection afforded by the United States Constitution Art. III, § 2, Cl. 3, and the Sixth Amendment where petitioners, according to the government's proofs, had *first* committed all the acts necessary to constitute the asserted offense in the State of New York, and were *thereafter* inveigled by federal agents into the commission of an incidental act in Louisiana for the purpose of affording a basis of venue there?

(4) Where petitioners, New York residents, moved to transfer the proceeding from the District Court for the Western District of Louisiana to the District Court for the Southern District of New York, pursuant to the provisions of Rule 21 (b) Federal Rules of Criminal Procedure, and it appeared from the indictment that the offenses charged were committed both in New York and Louisiana and it further appeared from uncontroverted affidavits that numerous defense witnesses who resided in New York, Massachusetts, Illinois and Maryland, would testify voluntarily if the trial were held in New York but could not and would not do so in Louisiana because of the inordinate traveling distances, expenses and time away from their homes, businesses and employments, and where no countervailing reason for holding the trial in Louisiana appears, is the denial of the motion reviewable and if so, was refusal of transfer reversible error?

(5) Did the trial court commit reversible error in holding that the whiskey dealer who was in league with Alcohol Tax Unit agents to entrap petitioners was a co-conspirator and that his conversations with one of such agents were admissible against all petitioners?

(6) Did the trial court commit reversible error in admitting in evidence against all petitioners conversations between such whiskey dealer, and an alleged agent of the petitioners, without independent proof of the alleged agent's agency or complicity in the alleged conspiracy?

(7) Did the trial court commit reversible error in refusing to allow cross-examination of the chief government witness before the jury until after that witness had first been cross-examined by defense counsel in the absence of the jury, and then limiting the cross-examination to the questions there ruled allowable; thus in effect rehearsing the witness and thereby destroying many criteria by which the jury could judge the witness's veracity?

(8) Did the trial court deny petitioners' right to produce evidence in their own behalf and thus deprive them of due process of law by refusing to enforce a subpoena directed to the chief government witness (under Rule 17 (c) of the Federal Rules of Criminal Procedure) compelling him to produce the books and records of his business in Mississippi, there being no showing that this subpoena was "unreasonable or oppressive"?

(9) Were petitioners denied a fair, impartial trial by the trial court's uttering in the presence of the jury improper remarks which were highly prejudicial and biased against them; failure of the trial court to instruct the jury on the essential elements of the offense charged; charging the jury in an argumentative manner advocating the Government's cause; and otherwise charging the jury in a misleading and improper manner?

C.
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

In the decision sought to be reviewed, the Circuit Court of Appeals has decided important questions of federal criminal law which have not been, but which should be settled by this court; has decided federal questions in a way probably in conflict with applicable decisions of this Honorable Court, and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of your Honorable Court's power of supervision under the rule of *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608. The decision sought to be reviewed invades constitutional rights and sanctions an application of a criminal statute in a manner which is "so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." *Sorrells v. United States,* 287 U. S. 435, 446, 53 S. Ct. 210.

If the decision sought to be reviewed is allowed to stand, it will place in the hands of federal agents the power to provoke, incite and lure legitimate businessmen into violations of the very law which the government agents are supposedly enforcing. It will also place power in the federal agents to assure the trial of defendants at a place thousands of miles distant from the residences, places of business, and domiciles of defendants and defense witnesses by luring a defendant into the commission at such far away and well chosen spot of an additional act over and above that necessary to warrant prosecution for the offense, thus violating the protection afforded by the United States Constitution, Article III, § 2, cl. 3, and the Sixth Amendment.

Finally, it will permit trial judges in effect to prejudge cases and assure convictions by a purported exercise of discretion in denying proper motions to transfer proceedings to other districts where the offense, if any, has also been

committed in the district of defendant's domicile, place of business, and where his witnesses are available and thereby completely to ignore the "unfairness and hardship to which trial in an environment alien to the accused exposes him" *U. S. v. Johnson,* 323 U. S. 273, 275, 66 S. Ct. 28, and thus to sanction the perpetuation of the very abuses which led to the promulgation of Rule 21 (b) Federal Rules of Criminal Procedure.

Apart from such widespread effect on the administration of criminal justice in the federal courts, the decision sought to be reviewed, if permitted to stand uncorrected, will result in a denial to the petitioners of their fundamental rights to a fair, impartial trial according to the rules laid down heretofore by this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated Jan. 16, 1948.

ISRAEL NEEDLEMAN,
HARRY WEINER,
Petitioners.

By DAVID BERGER,
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IRWIN KOTT,
Petitioner.

By LOUIS HALLE,
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BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

The Criminal Provisions of the Emergency Price Control Act Were Not Intended to Apply to a Seller, Otherwise Innocent, Where the Alleged Over-Ceiling Sale Is Instigated by Government Agents in League With a Purchaser Not for Consumption or Use, and Where the Pretended Over-the-Ceiling Money Is Seized by Federal Agents for Return to Such Purchaser in Accordance With Previous Practice and a Prearranged Scheme and Design of the Agents and Purchaser to Arrest and Punish the Seller.

(Question 1.)

In *Sorrells v. U. S.*, 287 U. S. 435, 53 S. Ct. 210, the majority of this Court held that a federal prohibition statute, though denouncing in general terms conduct as criminal, may be found not to have been intended to apply where the conduct is instigated by federal agents for the purpose of luring a person, otherwise free from guilt, to the commission of the act so that he may be arrested and punished. In doing so it gave expression to the view that a criminal statute should not be applied where to do so would create a situation so shocking to a proper sense of justice as to invoke a call for the court "to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." In short, as articulated by the minority of the court deciding the *Sorrells* case, the Act creating the offence is to be construed "by reading in a condition or

proviso that if the offender shall have been entrapped into crime the law shall not apply to him." *Sorrells v. U. S.*, supra, at p. 456.

In construing the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. A., App. § 901 *et seq.*, heed must be paid to the express purposes enumerated in Title 1, § 1 thereof, 50 U. S. C. A. App. § 901. From these, it is at once apparent that Congress was primarily protecting the *ultimate consumer* and the nation at large from inflationary practices by those engaged in trades or businesses, whether buyers or sellers. And, in § 4, 50 U. S. C. A., App. § 904, the penal section, it is expressly provided that

> "It shall be unlawful, . . . for any person to sell or deliver any commodity, *or in the course of trade or business to buy or receive any commodity* . . . in violation of any regulation. . . ." (Emphasis supplied.)

Therefore, the purchaser in this case upon whose testimony the Government rests the entire foundation of petitioners' guilt is in *pari delicto* with the petitioners. This was recognized by the Court below which stated (p. 9 of its Slip Opinion, R. [illegible]):

> "Admittedly he entered into an unlawful agreement to buy liquor above the lawful price and any expectation that the Federal agents would recapture the money paid by him and return it to him would not make his act legal."

Yet, the same court approves the conduct of the federal agents who were, as already set forth hereinabove, not only in league with the purchaser, promising him immunity (R. 357), but were "cooperating" with him in the "making of cases" against price ceiling violators in the liquor trade as part of an arrangement whereby in return for his services in "catching" petitioners and other liquor wholesalers (R. 255; 303; 356; 729) he not only obtained whiskey at ceil-

ing price or below but also avoided serious income tax difficulties (R. 301).

A mere reading of the testimony of John, the informer, and Pace and Barlow, the Alcohol Tax Unit investigators, as summarized hereinabove, shows that the real and heinous conspiracy proved by the Government was that between John and the Alcohol Tax Unit agents. It is submitted that Congress never intended the application of the criminal provisions of the Act to apply to such sordid sales trumped up and engineered by a self-confessed bootlegger and black marketeer in co-partnership with federal agents obligated to enforce the Internal Revenue laws of the United States.

II.

Because of Entrapment, Petitioners' Motion for Judgment of Acquittal Should Have Been Granted.

(Questions 2 and 6.)

A.

Petitioners urge that under the principles enunciated in the majority opinion of the *Sorrells* case, the entrapment *proved by the Government* necessitated a judgment of acquittal since there was no properly admitted evidence from which the jury could infer that the petitioners had previously committed offenses of selling whiskey at prices in excess of price ceilings or had possessed a previous reputation for doing so.

To prevent judgment of acquittal, both the trial court and the court below necessarily relied upon testimony concerning one Hillman, named in the indictment as a co-conspirator but not indicted and not produced as a witness.

John, the informer, was permitted, over vigorous defense objections, to testify that in April, 1945 (some four months prior to the first contact in the series of events beginning in July, 1945 which led to the sale of the 356 cases of whiskey and the present indictments), Hillman

visited him and stated that he represented Distillers Factors Corporation, and offered to sell John whiskey at prices in excess of ceiling (R. 108-116). After rejecting the offer, John says he immediately reported it to the Alcohol Tax Unit (R. 116). Pace was also permitted over defense objections to testify that John informed the Alcohol Tax Unit of such offer (R. 646, 649, 651). John also testified that Hillman gave him the phone number of the Distillers Factors Corporation, which he called four months later (R. 115) in opening negotiations for the sale which is the subject matter of the present indictments.

This action of the trial court, affirmed by the Circuit Court of Appeals, permits Hillman to be treated as an agent and co-conspirator of petitioners solely on the alleged conversation of Hillman with John. But, such conversation is inadmissible except upon independent proof of Hillman's agency on behalf of petitioners or complicity with petitioners in a conspiracy, if one be proved. Nothing can be better settled than that agency cannot be proved by an agent's acts or declarations. [*Oliver v. Piatt*, 44 U. S. 333; *Durant Motor Co. of N. J. v. Georgia Florida Motor Co.*, 18 F. 2d 95 (C. C. A 5, 1927), to cite but a few of the multitude of cases upholding this elementary proposition; and see 4 *Wigmore Evidence*, § 1078, p. 123, particularly footnote 5.] Nevertheless, the trial court violated this elementary rule of evidence. By its affirmance, the Circuit Court of Appeals similarly permitted the Government to lift itself by its own bootstraps in introducing such damaging hearsay declarations in evidence against petitioners. Nor are these hearsay statements rendered admissible merely because the same witness, John, says that when he called the telephone number given him by Hillman four months previously, he was informed by the person answering the call that Hillman was not there (R. 119). Rather, this supports the conclusion that Hillman was *not* an agent or co-conspirator of petitioners.

Effort was made, upon an alternative ground, to support the admission of the Hillman-John conversations. It is said by both courts below that John was a co-conspirator and therefore the conversation with Hillman was admissible. The fallacy of this reasoning is apparent. It will be dissected under point V, *infra*, showing that such alternative ground is in violation of *Fiswick v. U. S.*, 329 U. S. 211, 67 S. Ct. 224.

The whole structure of the Government's view that there was here a "legal" entrapment rested on proof of the Hillman offer in April, 1945. So far as the *actual sale* is concerned, the Government's theory and proof is that John, in league with Alcohol Tax Unit agents made the first contact with petitioners in July, 1945 (R. 119) and that when John in Mississippi phoned New York offering to purchase *whiskey from petitioners, he had never had any previous dealings with any of them* (R. 298, 299). And there was no evidence that petitioners had any previous illegal dealings with anybody.

Once the hearsay statements as to what Hillman purportedly said are stricken out, as we maintain they must be, the structure collapses.

No evidence in this record warrants the Judge's charge in this respect:

> ". . . does the evidence reasonably tend to show that they were engaged in the black market business? If it shows, and if you are convinced beyond a reasonable doubt, that they were *already* engaged in that business insofar as the sale of liquor at black market was concerned, then what happened, or what took place would not constitute entrapment. . . ." (R. 1238) (Italics supplied.)

Nor is there warrant in the record for the statement of the court below that "These circumstances are such as would justify the jury in concluding that Kott and his associates were not novices in the black marketing of liquor."

(Slip Opinion, p. 8, R. 324) In support of this conclusion, the Circuit Court relies upon John's testimony that Kott declined to give him prices over the telephone but that if John would come to New York Kott would then make him a proposition. (Slip Opinion, p. 8, R. 324) The obvious answer to this is the fact that John was telephoning from Vicksburg, in Mississippi, which as a matter of common knowledge is a constitutionally "dry" state. Kott's refusal then to deal with John is therefore readily understandable since to do so contained the risk of a violation of both Federal and State liquor laws. Many other valid reasons for not coming to terms with John in an initial contact over the long distance telephone might have existed. Certainly, such testimony by John is not evidence which justifies a jury in concluding that petitioners had *previously* violated the price ceiling laws, as incorrectly assumed by the Court below.

There being no properly admitted evidence of petitioners' prior transgressions, it follows therefore that an "illegal" entrapment was proved by the government witnesses and accordingly, petitioners were entitled to a judgment of acquittal.

B.

Petitioners recognize that the minority view expressed in *Sorrells v. U. S.*, 287 U. S. 435, 53 S. Ct. 210, has not thus far been accepted by this Honorable Court. Nevertheless, petitioners respectfully submit that the principles expressed therein so cogently by Justice Roberts, and concurred in by Justices Brandeis and Stone, warrant re-examination by this Honorable Court. The fantastic facts of this case so brazenly testified to by the Government witnesses demonstrate the futility of distinguishing between "entrapment" where a defendant had a bad reputation or had previously committed a similar crime and where there is no such evidence of prior transgressions or bad reputation.

A defendant's guilt can only rest upon the commission of the offense with which he is charged. Concededly, evidence of past similar offenses may be *admissible* for the restricted purpose of showing wilfulness, intent or lack of inadvertence. But no one seriously contends that such proof may be *substantive evidence* of the commission of the particular offense with which a defendant is charged (except when the act is the exceptional one involving a predilection to do it). While a jury is permitted from such proof to find that *if* the defendant did the act denounced, he did so with criminal intent, it cannot find that *because* defendant committed *similar* offenses he did the act for which he is now being tried. Nor can it be logically stated that the offense of the officer instigating the crime for which the defendant is being tried is any the less to be condemned because he heard that the defendant had a bad reputation or that he had previously acted in violation of a prohibiting statute. The officer's function is to *prevent* crime not to *commit* it. Nor is it his function to cause a former offender to revert to his criminal career.

The court below, in affirming the petitioners' conviction, inferentially distinguished between a "legal" and an "illegal" entrapment. (See Slip Opinion, p. 8, R. 329). But, as stated in the minority opinion in *Sorrells v. U. S.*., at p. 459, this "in effect, pivots conviction in such cases, not on the commission of the crime charged but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment."

Here, as has already been demonstrated, the properly admitted evidence does not support the conclusion that petitioners suffered from a prior bad reputation as price-ceiling violators or that they had previously committed such offenses. Therefore, even under the majority view of the *Sorrells* case an *"illegal"* entrapment was disclosed by the testimony of the Government's witnesses.

Moreover, here, the transaction itself was perfectly legal. The seller had a legal right to sell the whiskey.

Any illegality could arise only from the asserted violation of the price-ceiling regulation. This case is therefore substantially different from those where the entire act is illicit, such as the narcotics cases.

It is respectfully urged that by application of the principles expressed in both the majority and minority opinions of *Sorrells v. U. S.*, petitioners were entitled to judgments of acquittal on the testimony of the Government's witnesses.

III.

Petitioners Could Not Be Tried, Over Their Objections, in the District Court for the Western District of Louisiana Where the Government's Proof Shows as the Only Basis for Such Venue the Commission There of an Incidental Act After Conduct Sufficient to Warrant Prosecution in New York, and Where the Government Proves that Commission of Such Act Was Instigated, Induced and Caused by the Federal Agents for the Purpose of Enabling Petitioners' Prosecution and Trial in Louisiana Rather than New York.

(Question 3)

This record proves that by prearranged schemes between John and the federal agents Kott was ensnared and entrapped into entering Louisiana and there accepting the alleged over-the-ceiling money for the purpose of "getting this violation down here for trial" in Louisiana (R. 731; 321; 326; 332; 390; 637; 639; 640).

Petitioners concede that apart from this "dirty business" (per Holmes, J. dissenting in *Olmstead v. U. S.*, 277 U. S. 438, 470, 48 S. Ct. 564) venue for their trial in Louisiana would exist.

However, petitioners contend that the abhorrent conduct of the Government agents in deceitfully luring and ensnaring Kott into the commission of an act in Louisiana (acceptance of the pretended over-the-ceiling money) in order to expose the petitioners to the unfairness and hard-

ship of trial in the Western District of Louisiana withdraws from such overt act the quality—which otherwise it would have possessed—of clothing the Louisiana courts with venue. Upon the Government's evidence the offense, if any, had already been committed in New York prior to the inveigling of Kott into Louisiana. The Act itself (50 U. S. C. A. App § 942) defines a "sale" as follows: "(a) The term 'sale' includes sales . . . and contracts and offers to do any of the foregoing. The terms 'sell,' 'selling,' 'seller,' 'buy,' and 'buyer,' shall be construed accordingly." Therefore, payment of the entire or part of the purchase price is not essential. It is not made part of the offense, and is not even mentioned in the Act or pertinent Regulations (Regulation No. 445, §§ 5.3; 5.4; 5.5; and 7.8). Consequently, the acceptance of the alleged over-the-ceiling money by Kott was an act purely incidental to and not a constituent element of the offense herein charged.

Petitioners urge that their trial, under the circumstances, was as much a violation of their protection under Article 3, § 2, Cl. 3, and the Sixth Amendment of the Constitution as if no overt act had been committed in Louisiana. Consideration of the fair administration of criminal justice and the effective enforcement of the criminal laws supports this view and requires the conclusion that the District Court for the Western District of Louisiana had no venue.

IV.

The Trial Court Committed Reversible Error in Denying Petitioners' Motion to Transfer the Proceedings to the Southern District of New York.

(Question 4)

Prior to trial, petitioners moved under Rule 21 (b) to transfer the proceedings from the Western District of Louisiana to the Southern District of New York (R. 50-55). In support of the motion, affidavits were filed (R. 31-48). From the motion and supporting affidavits, it appears that

the petitioners are residents of New York; that the negotiations for the purchase of the liquor took place in petitioner Weiner's office in New York; that the negotiations lasted for a period of about 10 days; that office personnel were in a position to hear and see what occurred during such negotiations; that four other persons saw and heard the negotiations; that two women guests of John and Pace were in the hotel rooms during the conference there; and that all of such persons residing in New York would be called as witnesses to prove that the transaction was in accordance with controlling regulations (R. 31-48). Additionally, petitioners averred that the notary before whom John swore to the facts contained in affidavit G-2 (R. 47) resides in New York and would be called to rebut John's denial (in removal proceedings previously held in New York) that he took the affidavit in the presence of the notary (R. 34). Petitioners further showed that they would call five witnesses to prove a similar course of conduct on the part of Pace and John in Boston, Massachusettes in their endeavor to entrap other persons into the commission of similar offenses (R. 34); that such witnesses reside in Boston and expressed a willingness voluntarily to come to New York to testify on behalf of the petitioners (R. 34, 35), as would another witness to a similar entrapment in Chicago (R. 35).

Petitioners further showed that they intended to call three witnesses residing in Baltimore, Maryland, to prove yet another similar entrapment, and that such witnesses would voluntarily come to New York to testify on behalf of petitioners (R. 35). Petitioner, Weiner, averred an intention to call character witnesses residing in New York, and witnesses to prove that he was absent from New York during the negotiations (R. 38). Finally, petitioners averred that the cost of bringing all such witnesses to Monroe, Louisiana for an extended trial would be prohibitive and that such witnesses could not afford to absent themselves and would not voluntarily do so for such an extended period of time from their homes and businesses

(R. 36), particularly, in view of lack of full travel facilities to Louisiana (R. 36), the impracticability of quartering all these witnesses in Monroe, Louisiana because of scarcity of hotel space there; and that without such witnesses petitioners "could not receive fair trial (s) as guaranteed" to them "by the Constitution of the United States of America" (R. 36).

None of the above enumerated facts were controverted. Nor was there any showing why convenience to the government required the trial to be held in Louisiana.

Yet, the trial court summarily dismissed the motion to transfer, apparently on the ground that to do so was not an "abuse of discretion" and hence not even reviewable. This is apparent from the following remarks of the trial court upon a motion for allowance of an appeal from the denial of transfer:

> "In other words, if as the Government contends, these defendants were engaged in the business up there of operating a distillery and dealing in black market liquor, and so forth, it would be somewhat unique, to say the least, to have them carry that on, and stay *within their hole,* so to speak, and then when a criminal case against them might arise in some other jurisdiction, or some other section to say that it could not be heard in that section, but that it must be brought back there to their own doorsteps to be tried . . .
>
> • • •
>
> "If this matter is one that is within the discretion of this Court, and if the showing here is *not sufficient to constitute an abuse of the discretion of the Court,* then this order is not appealable" (R. 63, 64). (Italics supplied.)

In the view of the Court below affirming this action of the trial court, "merely an erroneous exercise of that discretion will not require a reversal." (Slip Opinion p. 6, R. 93).

Both courts, in so doing, acted counter to the admonition of this Court in a case long antedating the new Rules of Criminal Procedure (*Hyde v. Shine,* 199 U. S. 62, 78, 25 S. Ct. 760) where Justice Brown speaking for the Court stated:

> "But we do not wish to be understood as approving the practice of indicting citizens of distant States in the courts of this District, where an indictment will lie in the State of the domicil of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not be subjected, if the case can be tried in a court of his own jurisdiction."

Despite this court's admonition the condemned practice continued and resulted in the adoption of Rule 21 (b). See New York University Law School Institute, Federal Rules of Criminal Procedure, pp. 274, 275; and discussion by Judge Yankwich in *United States v. National City Lines,* 7 F. R. D. 393, 395, 396, 397, (D. C. S. D. Calif.).

The cavalier denial of the petitioners' motion cannot and should not be supported on any theory of unreviewable discretionary conduct of a trial judge Once the trial judge is "satisfied that in the interest of justice the proceeding should be transferred to another district" it is mandatory under Rule 21 (b) that the Court transfer the proceedings. Withholding the "satisfaction" thus required must be *bona fide* and reasonable. Judge Yankwich has well stated what is meant by the phrase "in the interest of justice" as follows (7 F. R. D. at 397, 398):

> "The phrase 'in the interest of justice,' like the analogous one which occurs often in statutory enactments, 'in the furtherance of justice,' has a broad

meaning. It implies conditions which assist, or are in aid of or in the furtherance of, justice. Both call for the doing of things which bring about the type of justice which results when law is correctly applied and administered. They import the exercise of discretion which considers both the interests of the defendant and those of society. When commanded by a statute, they do not attempt to determine, in advance, the type of judicial action to be taken. As said by the Supreme Court in a well known case:

> 'The term "discretion" denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with a regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" Citing *Langes v. Green,* 282 U. S. 531, 541, 51 S. Ct. 243, 247.

This Court has recently reiterated its denunciation of the practice which "opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense," and "the appearance of abuses . . . in the selection of what may be deemed a tribunal favorable to the prosecution." *U. S. v. Johnson,* 323 U. S. 273, 276, 66 S. Ct. 28.

Surely, since questions of venue in criminal cases are not lightly to be dismissed as mere matters of formal legal procedure but "as raising deep issues of public policy in the light of which legislation must be construed" (*U. S. v. Johnson, supra,* at p. 276), a trial court's denial of a proper motion to transfer cannot be immune from review and reversal upon the ground that it is "merely an erroneous exercise of discretion."

If no proper basis existed for the denial of the motion, the resulting error must be rectified. To hold otherwise in this case would be to nullify the plain purpose of Rule 21 (b) and to sanction the pre-determination by the trial judge of petitioners' guilt, as expressed in his statement that if they were to be tried in New York "it seems to me it would be a very easy matter for them to carry on such illegal operations and never have to pay the penalty therefor" (R. 63).

It is amply clear that the denial of the motion to transfer was not "merely an erroneous exercise of discretion", as thought by the Circuit Court of Appeals, but was such an appalling abuse as to require correction and reversal by this Honorable Court.

V.

Since John, the Informer, Was Never a Co-Conspirator With Petitioners, His Statements Could Not be Binding Upon Them and Could Not be Considered in the Determination of Their Guilt.

(Question 5.)

In *Fiswick v. U. S.*, 329 U. S. 211, 67 S. Ct. 224, this Court, though recognizing the rule that the act of one partner in crime is admissible against the others where it *is* in furtherance of the criminal enterprise, held inadmissible statements of one, previously a co-conspirator, which were *not* in furtherance of the criminal object. It was there held that statements made by a co-conspirator to the federal agents after his apprehension, being a "frustration" of the criminal enterprise, were inadmissible.

A fortiori, the statements of an informer who at all times during the charged conspiracy is working hand in glove with federal agents, reporting each conversation to them, are inadmissible against those whose actions he has reported. Such statements obviously were not made in furtherance of the asserted conspiracy. The error of the

court below in holding John a co-conspirator with the petitioners is manifest in its statement (Slip Opinion, p. 9, R. 325):

> ". . . although John lent his services readily to the Federal agents in assisting in securing evidence of the violation of the Act, nevertheless the jury, with all good reason, could conclude that *his cooperation with the Federal agents did not necessarily relieve him of complicity in the conspiracy.* His purpose in so doing could have been to get a supply of liquor for John's Beverage Company and at the same time to curry favor with the agents in order to keep from being indicted." (Italics supplied.)

Were that the law, then by a parity of reasoning, since John was in co-partnership with Pace and the other Government agents, the statements of the Alcohol Tax Unit investigators to each other and to John would be admissible *against petitioners.* Such an absurdity would indeed increase convictions and make easy the efforts of those employed to enforce the laws. In fact, it would make unnecessary any real efforts at detection. The agents could prevail upon an informer to induce and instigate persons to commit acts asserted to be criminal and could then make a prima facie case against those persons by holding a series of conversations between the agents and the informer, containing all the elements of the offense charged within the dialogue. A jury would, under the reasoning of the court below, then be permitted to conclude that the informer and the agents were co-conspirators with the persons induced to commit the acts denounced as criminal. The hearsay statements would then be admissible and available as substantive evidence upon which to convict!

Here, as in *Fiswick v. U. S.*, 329 U. S. 211, 67 S. Ct. 224, the admission of John's statements to Pace (R. 646, 648, 649-652) and John's conversations with Hillman (R. 110-116) was not only error, but was harmful, prejudicial

error. It cannot now be said with fair assurance that the jury was not substantially swayed by the use of the statements against all petitioners. *Kotteakos v. U. S.*, 328 U. S. 750, 66 S. Ct. 1239. In fact, it may be said with fair assurance that the jury *was* swayed by such statements. As has already been noted, the court below regarded this as a "legal" entrapment because of Hillman's alleged statements to John and John's repetition thereof to Pace. On this ground alone, reversal is required, *Kotteakos v. U. S.*, supra, and *U. S. v. Blumenthal*, — U. S. —, decided December 22, 1947.

VI.

The Trial Court's Restriction on the Cross-Examination of the Chief Government Witness Was Prejudicial, Harmful Error.

(Question 7.)

Petitioners contend that the trial court deprived them of their most valuable right—that of cross-examining the chief Government witness—by requiring them to conduct a thorough cross-examination of John *not in the presence of the jury* as a condition precedent to their subsequent cross-examining of the witness before the jury. They were forced to join in what amounted to a dress rehearsal.

John had testified in his direct examination to facts which were the foundation of the entire case against petitioners. Only by cross-examination, "the greatest legal engine ever invented for the discovery of truth" (Wigmore on Evidence (2d Ed.), sec. 1367) could petitioners show John in his true light before the jury so that they could judge properly who told the truth in the entire matter. This they could do as a matter of right. *Alford v. U. S.*, 282 U. S. 687, 51 S. Ct. 218.

Yet throughout the trial, Judge Dawkins expressed concern about bringing in matters relating to the "Mississippi mess" (R. 916), and time after time revealed a purpose to protect the record from inclusion of evidence relat-

ing to John's multifarious illicit activities in Mississippi (R. 220; 265-6; 377; 509; 935; 987). Indeed, the contrast between his solicitude for keeping out of the record the tale of Mississippi corruption and his lack of concern for the protection of petitioners' rights is striking.

The jury should have been permitted to learn the truth about John, even if in the process of his cross-examination details of the Mississippi bootlegging corruption might come to light.

When counsel for the petitioners attempted to attack John's credibility by showing on cross-examination his character and his persistent course of law-breaking in Mississippi, the prosecutor objected (R. 191, 195). The Court thereafter *excused the jury* and followed this procedure: He laid down a general rule governing the scope of the cross-examination of the witness and then required counsel for petitioners to question the witness. As the prosecuting attorney phrased it,

> ". . . after these questions are answered you will then rule on what questions may be asked and answered and *then we will repeat those in front of the jury.*
>
> THE COURT: That part that I rule in, will go to the jury." (R. 203) (Italics supplied.)

Counsel for petitioners objected to this procedure but were overruled (R. 203). Thereupon, from page 203 to page 284 of the Record, follows the preliminary cross-examination of John.

The vice in this unique procedure is that the jury is deprived of the opportunity of viewing the *initial* reaction of the witness to the questions put to him and observes the witness's demeanor only *after* he has had one or more chances to answer the same question, when he is freshly rehearsed and knows how to answer. Here, this is particularly evident because John was evasive and shifty throughout this dress rehearsal, so much so that the Court

repeatedly found it necessary to admonish the witness to answer responsively (R. 206; 207; 238; 239; 246; 249; 252; 254; 256). Indeed, during this preliminary cross-examination the Court actually directed the witness to "answer truthfully" and indicated that the informer was lying. At one point the Court stated:

> "THE COURT: You should know that, Mr. John, without qualification. Is it true or not? *I want you to answer these questions truthfully.*" (R. 249)

And, at another, the Court said:

> "THE COURT: Mr. John, you have not answered this man's questions frankly, *because you have changed your testimony once or twice.* You stated that the whiskey was shipped to Henegan and Hieman, and then you testified that the whiskey that was sent to Hieman was taken by you and sold by you in Mississippi. Why didn't you state that at first?" (R. 252; 253) (Italics supplied.)

So that, in effect the witness was instructed how to answer *before the jury.* To hide from the jury these obvious manifestations of untruthfulness, evasiveness and lack of frankness, as well as downright refusals to answer, was to deprive petitioners of the substance of their right to cross-examine.

And it is no answer that the Court was entitled to know the purpose of the inquiry. The right to cross-examine exists without any requirement of showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief. *Alford v. U. S.*, 282 U. S. 687, 51 S. Ct. 218.

Adoption of this unauthorized procedure, over petitioners' objections, destroyed the main criteria by which the jury could judge John's veracity and so deprived them of that fair impartial trial which was their fundamental right.

VII.

The Court Improperly Quashed the Subpoena Directing John to Produce the Books and Records of His Mississippi Business, in Violation of Rule 17 (c) of the Federal Rules of Criminal Procedure, and Thereby Denied Petitioners Their Right to Produce Evidence in Their Own Behalf.

(Question 8.)

On direct examination, John said he was in the whiskey business in Vicksburg, Mississippi, and that his wife was the owner of Johns Beverage Co. in Tallulah, Louisiana (R. 108). Petitioners challenged this and attempted to show that John was the real owner of the Louisiana business which was being operated in her name, as a blind for him, because of John's criminal record (R. 190; 194; 381). In order to establish this and to determine what other crimes involving moral turpitude John may have committed (R. 380; 381) petitioners sought to have his Mississippi books and records produced. They therefore subpoenaed them. The Court ruled that John need not produce these documents because "I am not going into the Mississippi end of it" (R. 509; 376). Evidently, the trial judge felt that any such evidence was "irrelevant." If so, he misconstrued the purpose of Rule 17 (c). Obviously, this rule is to enable discovery. The question of relevance cannot be determined *in limine*. See New York University Law School Institute Proceedings, Federal Rules of Criminal Procedure, pp. 167, 168.

Moreover, there was no showing that the subpoena was "unreasonable or oppressive." Therefore, there was no warrant for quashing the subpoena under Rule 17 (c). Cutting off the inquiry *in limine* was prejudicial error and in violation of petitioners' fundamental right to produce evidence in their own behalf, the barest minimum requirement of due process.

VIII.

The Court's Conduct of the Trial Was Otherwise Prejudicially Erroneous.

(Question 9.)

A.

Improper Remarks of the Trial Judge.

The bias and prejudice of the trial judge is clearly disclosed by his remarks during the questioning of Pace, the chief Alcohol Tax Unit investigator. The Court gave detailed instructions to the prosecuting attorney as to the manner of questioning this witness (R. 647; 652). At one point the trial judge made a categorial statement of fact against petitioners (R. 651; 652).

Pace, after coaching by the judge, was improperly permitted to state that petitioners' "representative [Hillman] was offering to sell whiskey at some $23.00 a case over the celing to various wholesale liquor dealers throughout this district—the 10th District—which was Mississippi, Louisiana and Texas" (R. 648; 651). Petitioners' motion to strike this was denied (R. 651). The damage resulting from this erroneous ruling was compounded when, thereafter, the following statements were made:

> "The Witness: And that the firm was located in New York and that the defendant made these offers to Comell John, and as I said, acting on instructions from the Washington office in New York who had contacted Comell John—or he had contacted us and told us of the plan that was set out to him how he could purchase the whiskey.
>
> The Court: *And told by John's plan as set out to him, by which he, John, could get the liquor*" (R. 651-652). (Italics supplied).

This was a direct statement of fact by the trial judge to the jury against petitioners.

In striking contrast with the Court's solicitude for and protection of prosecution witnesses is his treatment of former Sheriff Buchanan, of Warren County, Mississippi, a defense witness. The Court's browbeating of this defense witness is clear from his remarks before the jury (R. 930; 932; 939; 940) and his warning to Mr. Buchanan while the jury had been excused (R. 937). Moreover, while erroneously limiting the impeachment of the chief Government witness, John, as summarized hereinabove, the Court permitted extensive efforts to show Sheriff Buchanan was implicated in Mississippi bribery to impeach the defense witness (R. 936).

Finally, and most damaging to the petitioners, was the Court's extensive cross-examination of petitioner Weiner (R. 1055-1061).

B.
Errors in Court's Charge.

1.
The Court Assumed that the Sale Was from One Wholesaler to Another and Accordingly Instructed the Jury Only as to the Price Ceilings Governing Such Sales.

One of the major points of defense was that John bought this whiskey for himself, for sale to consumers in Mississippi (R. 1070). Needleman testified to a conversation between John and Kott in which John made statements indicating that John sold whiskey by the fifth and the pint (R. 1067). John might have been both a wholesaler and a retailer. If John was a retailer, an entirely different price ceiling was applicable. (Regulation 445, § 5.4, prescribing ceiling prices to wholesalers; § 5.5, prescribing prices to retailers.) Yet, the court not only failed to define "wholesaler" and "retailer" but assumed as a *fact* that the sale was from one wholesaler to another (R. 1225; 1230). Despite petitioners' calling the matter to the Court's attention, the judge repeated this conclusion to the jury (R. 1260).

In so doing, the Court clearly invaded the province of the jury. This was harmful, prejudicial error since petitioners were entitled to an acquittal if the sale was from a wholesaler to a retailer, there being no proof that the sale was in excess of price ceiling regulations governing sales from a wholesaler to a retailer.

2.

The Court Failed to Define the Offense Properly.

The Court's refusal to instruct the jury as to the definition of a sale from a wholesaler to a retailer, or wholesaler to wholesaler, and to tell the jury what the price regulations provided for in the case of a sale from a wholesaler to a retailer, constituted a failure properly to define the offense charged. The instructions therefore were fatally erroneous. *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402; *U. S. v. Max*, 156 F. 2d, 213 (C. C. A. 3).

3.

The Court Improperly Refused to Caution the Jury on John's Testimony.

The Court's refusal to charge (R. 1261) as requested by petitioners (Request 32 (f) R. 1214) that Comell John was an informer and that his testimony should be examined with greater care and scrutiny than the testimony of an ordinary witness, was prejudicially erroneous. Though there can be no doubt that John was an informer, the trial judge ruled otherwise, asserting that "This was merely a transaction carried on by John to procure some liquor, and he simply called in the agents to come and witness it. I deny the giving of 32-F" (R. 1261).

Here again the Court assumed a fact and reached a conclusion directly contrary to the evidence in the case. At the very least, the jury should have been permitted to decide whether John was an informer.

Petitioners maintain that upon the Government's proof it must be held as a matter of law that John was an in-

former. Accordingly, the requested instruction should have been given and its refusal was prejudicial error. See *Holmgren v. U. S.*, 217 U. S. 509, 524, 30 S. Ct. 588.

4.

The Court's Charge Was Partial, Argumentative and Advocated Belief in the Prosecution's Case.

In discussing the defense evidence by petitioners Weiner and Needleman and by defense witness, Collins, that Weiner was not even in New York during the 10-day period of negotiations there, the Court demolished this defense with these words:

> ". . . and you can consider all of that in the light of ordinary human experience, and in the light of his explanation, as to whether or not it is reasonable, and so forth.
>
> Now then, gentlemen, the *question with regard to all of that testimony is,* is *that a reasonable explanation? Do you believe it? Do you think it is reasonable? Does it satisfy you? Do you think it rings true?*" (R. 1243.) (Italics supplied.)

Even in cold print, realizing the atmosphere of this trial, it is at once apparent that the Court was arguing the prosecution's case. Particularly so, in the light of the Court's further remarks concerning the evidence with regard to John's affidavit (G-2) to this effect:

> "Does that jibe with reason and common sense? If a concern is engaged in a legitimate business is it necessary for that concern to procure from a seller a statement to the effect that that purchaser—I mean to procure from a purchaser a statement that that purchaser has not paid any black market, or over-ceiling money for that commodity?" (R. 1243)

Such argumentative advocacy in favor of the prosecution is fatal error. *Quercia v. U. S.*, 289 U. S. 466, 53 S. Ct. 698.

And, further, after the Court extolled the advantages of a democracy over a dictatorship, he charged the jury as follows:

> "In this country every man, no matter what his race, color, religion, or creed may be, stands before the Courts equally with every other man. It doesn't make any difference whether he is a pauper, or whether he is a millionaire, or whether he is Jew, Gentile, Negro, or any other race, color, creed, he stands before the Bar the equal of any other person when it comes to a decision of his rights, and of his innocence or guilt.
>
> *At the same time we have the duty—you and I are charged with the responsibility here, I as a judge, you as jurors, the District Attorney as the prosecuting officer and those others who are officers of this Court, to see to it that justice is done.*" (R. 1247.) (Italics supplied.)

Apart from the tonal inflection which of course is impossible of reproduction, obviously this statement identifies the prosecution with the Court and virtually directs a guilty verdict since "the influence of the trial judge on the jury is necessarily and properly of great weight." *Starr v. U. S.*, 153 U. S. 614, 626, 14 S. Ct. 919; *Quercia v. U. S.*, *supra.*

5.

Throughout the Trial the Court's Treatment of John's Position Was Inconsistent. His Failure to Clarify This Vital Question in His Charge to the Jury Was Fatally Erroneous.

At one point, the Court stated in the presence of the jury that John was a "co-conspirator" (R. 674, 675); but at another point he stated that John was actively engaged with Government agents to "catch" petitioners (R. 296). This would of course have made him an informer, which obviously he was. Yet, in his instruction to the jury he

stated that John was not an informer (R. 1261). And in yet another portion of the charge he views John as "alleged" by the Government to be a "purchaser" (R. 1236). Such misleading instructions to the jury cannot be regarded as a mere "technical error." Rather, they went to the crux of this case and were harmfully prejudicial to petitioners, and require reversal. *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402.

Conclusion.

We respectfully submit that this is a case which deserves review by this Honorable Court. Grave constitutional questions are directly put in issue. In addition, it is submitted that since this case presents serious questions affecting the administration of federal criminal law it calls for the exercise of this Honorable Court's supervisory power over federal criminal prosecutions under the rule of *McNabb v. United States,* 318 U. S. 332, 63 S. Ct. 608.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947

No.

IRWIN KOTT, ISRAEL NEEDLEMAN AND HARRY WEINER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

I.

Nowhere does it appear in the Government's statement of the facts that, from the mouths of the prosecution witnesses, *a large scale conspiracy* was shown to exist between the Federal Alcohol Tax Unit Agents and John, the chief Government witness, whereby they plotted, planned and cooperated in the "making of cases" against whiskey sellers based upon asserted violation of the O. P. A. price ceiling regulations. The Government's brief conveniently ignores at least three other joint enterprises between the federal agents and John in which unsuspecting whiskey sellers were induced and caused to enter into transactions with John for the sale of whiskey at prices in excess of ceiling and in which the unwary sellers were pounced upon and arrested; the money paid by John to them was seized and returned to him and he was permitted to go scot free, meanwhile enjoying the fruits of the nefarious conduct.

These were the so-called "Cooper-Rudy deal" (R. 255; 303), the "Morton deal" (R. 303) and the "Boston" venture (R. 729).

These are facts of vital importance. They support the first point, presented in the petition, that the Emergency Price Control Act of 1942, 56 Stat. 28, as amended, 50 U. S. C. A. App. §§ 904, 925 was never intended to make criminal pretended "over ceiling" sales trumped up, engineered and produced by the joint machinations of an habitual violator of the Act and federal agents. The object of the statute was the protection of *ultimate consumers*. Buyers such as John who purchased in the course of trade for business were not only not protected by the Act but were specifically made subject to its penal provisions. § 4 of the Act, 50 U. S. C. A. App. § 904.

In reality there was no over-the-ceiling sale in this case. It was merely a sham and one which was designed by the federal agents for the purpose of "catching" petitioners and punishing them.

It is submitted that upon the Government's proof the conduct of petitioners was not such as was intended to be punished under the provisions of the Act. Cf. *Sorrells v. U. S.*, 287 U. S. 435.

II.

In answer to petitioner's contention, apart from their assertion that the record discloses an entrapment requiring a reversal, the Government states "These were no innocent persons instigated to illegal action; these were illegal operators who 'acceded without hesitation and as a matter of course' to an offer to purchase. *Casey v. United States*, 276 U. S. 413, 419." (Brief in Opposition, p. 8). But, this assumes the conclusion. *There was no evidence, properly admitted, to support such a contention.* Upon this record, it cannot be said that petitioners were previously guilty or prior to this transaction "illegal operators".

It must be remembered that in this case, unlike in *Casey v. United States, supra*, entrapment was urged as a

reason for acquittal. In the *Casey* case the majority of this Court did not feel at liberty to accept the suggestion by the Court itself "that the Government induced the crime." As stated by Justice Holmes, "A Court rarely can act with advantage of its own motion, and very rarely can be justified in giving judgment upon grounds that the record was not intended to present." (276 U. S. at pp. 418, 419).

Moreover, the Court was there dealing with a narcotics case, where the transaction itself was illicit. Here, the sale of the whiskey was perfectly proper and legal, apart from the price at which it was sold. The Court there stated "We are not persuaded that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger." (276 U. S. at p. 419). Here, petitioners were not bootleggers and the actions of the federal officials went far beyond merely ordering a drink from a suspected bootlegger. The record discloses a course of conduct on the part of federal agents which was reprehensible and vicious. It is not to be any the less condemned merely because some of the actions against petitioners were initiated by John, a private person, in league with the federal officials. *Cf. Anderson v. U. S.*, 318 U. S. 350, 356.

Petitioners submit that what Justice Brandeis dissenting in *Casey v. United States,* 276 U. S. at 423, stated is here pertinent: "I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Gov-

ernment may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."

III.

The Government's brief in opposition to the petition makes the surprising statement that "it is immaterial whether Hillman was or was not an agent of petitioners or a co-conspirator with John to render admissible the testimony in regard to Hillman's offer to John and John's statement to Pace about that offer" (p. 9). The Government thus abandons the reasons relied upon by both courts below for admitting this evidence (R. 109; 1233; 163 F. 2d 984, 987, 988) as it must, in view of *Fiswick v. U. S.*, 329 U. S. 211, conveniently ignored by the Circuit Court and the Government's brief. The Government is apparently confusing the question of the *relevancy* of evidence offered to prove a fact with the *competency* of that which is offered in evidence. Assuming arguendo that whether petitioners had *previously* committed the offense of sale of whiskey at over ceiling price was relevant to the issue, such fact could only be proved by competent evidence. Manifestly, such fact could not be proved by bald hearsay statements. Hillman's declarations were not admissible against petitioners without independent proof that he was connected with the conspiracy charged by the Government or that he was *then* acting as an agent of the petitioners. "However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy, *Minner v. United States*, 57 F. 2d 506; and see *Nudd v. Burrows*, 91 U. S. 426. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U. S. 60, 75; *Fiswick v. United States*, 329 U. S. 211; *United States v. Blumenthal*, — U. S. —, decided December 22, 1947.

At its best, John's testimony of Hillman's statements only shows that *John and Hillman* were predisposed to commit the offense—certainly not as incorrectly stated in the Government brief (p. 9) "that the *accused* were predisposed to commit the offense."

Weathers v. United States, 126 F. 2d 118 (C. C. A. 5), cert. den'd, 316 U. S. 681 and *United States v. Becker,* 62 F. 2d 1007 (C. C. A. 2) relied upon by the Government are not in point. In neither case was the evidence admitted by the trial court challenged on the ground that it was hearsay. In the *Becker* case, the Court expressly alluded to the fact that the challenged evidence "was not an unsworn declaration and so hearsay." (62 F. 2d at 1009).

Nor can John's statement to Pace about the Hillman offer be regarded as "reasonable grounds" to support Pace's belief in petitioners' guilt of previous black market operations. What John told Pace was a mere statement, otherwise completely unsupported, that Hillman *said* he was representing Distillers Factors Corporation. Certainly, such hearsay upon hearsay cannot be "reasonable grounds" for Pace to believe *petitioners* were "predisposed to commit the offense." Particularly so, since, at the time when John reported the Hillman conversation to Pace and until the sale here involved John had never had any dealings with the petitioners (R. 298, 299) and there was no evidence that petitioners had any previous illegal dealings with anybody, or that Pace had any such evidence. This Court, speaking of an illegal search, stated: "In law it is good or bad when it starts and does not change character from its success." *U. S. v. Di Re,* — U. S. — decided Jan. 8, 1948. Similarly, an "illegal" entrapment in which, when undertaken there is no reasonable ground to believe the victim had engaged in prior similar offenses, does not change its character because of its success. Nor does it become any the less "illegal" because of evidence obtained by the federal agents during the course of the entrapment. "Reasonable grounds" to believe in petitioners'

prior guilt must have existed when the Alcohol Tax Unit Agents undertook this entrapment. Such "reasonable grounds" cannot be based upon something turned up *after* the entrapment has begun to work on the petitioners.

In the footnote to page 9 of the Brief in opposition, it is asserted that "Hillman's agency for petitioners at the time he made the offer to John was in fact established, not only by Hillman's own statements to that effect, but by Kott's willingness to talk with John at the time of his first telephone call asking for Hillman (R. 117-118), and by the admissions of Weiner and Needleman that Hillman had been their representative (R. 127-128)." This misleading assertion does not accurately reflect the record. *Hillman did not testify.* His "own statements" are John's declarations that Hillman stated he represented Distillers Factors Corporation. Kott's speaking over the telephone to one who called him from Mississippi clearly sheds no light on Hillman's authority on behalf of petitioners to offer whiskey at over-the-ceiling prices to John *four months* previously. Neither Needleman nor Weiner "admitted" that Hillman "had been their representative" in making such offer. Weiner denied ever being with John in New York (R. 1032-1035) and Needleman denied that Hillman was an agent of petitioners or that he had so stated to John (R. 1087; 1094). John's testimony that Needleman said to him that Hillman "had collected some money, around $25,000.00 from different people, and hadn't turned it in to them—" (R. 127) clearly fails to establish that Hillman was petitioners' agent, four months previously, to offer whiskey at over-ceiling prices.

Nor can it be correctly asserted that the error in admitting John's testimony of Hillman's offer in July was harmless. In the first place, without such evidence the entrapment concededly is "illegal" and therefore the convictions must be reversed. Secondly, without it there was no justification for the Court's leaving to the jury the question of whether at the time the Government agents and

John set out to entrap petitioners "they were *already* engaged in . . . the sale of liquor at black market" (R. 1238). Finally, the erroneous admissions into the evidence of John's testimony concerning Hillman's offer to him in July, 1945 must have influenced the jury in considering petitioners' denial that they had sold the whiskey here involved at an over-the-ceiling price. Consequently, reversal must follow. *Kotteakos v. U. S.*, 328 U. S. 750; see *U. S. v. Blumenthal*, — U. S. —, decided December 22, 1947.

IV.

The Government apparently misapprehends the third question presented by the petition. Petitioners question the propriety of their trial in the Western District of Louisiana where the record shows as the only basis for trial there (over their objections) the commission of an incidental act following conduct sufficient to warrant prosecution in New York; and especially where the record shows that commission of such act was instigated, induced and caused by the federal agents for the purpose of enabling petitioners' prosecution and trial in Louisiana as shown by the testimony of Pace, the chief Alcohol Tax Unit Investigator, to the effect that his object was "getting this violation down here for trial" (R. 731), as well as that of Government witnesses John and Barlow (R. 321; 326; 332; 390; 637; 639; 640).

Petitioners complain not merely of a refusal to grant a change of venue. Petitioners contend that their trial in Louisiana was a substantial violation of the protection afforded to them under the United States Constitution, Article 3, Section 2, Clause 3 and the Sixth Amendment because of the "dirty business" of the Government agents in luring Kott into the commission of an incidental act in Louisiana merely to fasten venue there. The Government's brief concedes that petitioners were lured into Louisiana, but attempts to gloss over the reprehensibly vicious con-

duct on the part of the federal agents by stating that "petitioners were not lured into committing an offense in the south" (p. 11). This is indeed a novel approach to the serious question ofthe proper venue of criminal trials. It assumes either that trial of petitioners could be legally held in one section of the "south" as well as in another or that trial in that part of the "south" selected by the entrapping agents was in fact less prejudicial to petitioners than their trial in any other part of the "south". Certainly, such an attitude is not consistent with either the spirit or letter of the Constitution. *United States v. Johnson,* 323 U. S. 273.

The Government's brief states "That the Alcohol Tax Unit investigators may also have preferred to have the cash representing the illegal purchase price transferred in Louisiana, rather than in Mississippi, thus becomes immaterial" (p. 12). To the petitioners, trial in Louisiana conducted by the judge who made the following comment even before the trial itself began was certainly not immaterial:

> "In other words, if as the Government contends, these defendants were engaged in the business up there of operating a distillery and dealing in black market liquor, and so forth, it would be somewhat unique, to say the least, to have them carry that on, and stay *within their hole,* so to speak, and then when a criminal case against them might arise in some other jurisdiction, or some other section to say that it could not be heard in that section, but that it must be brought back there to their own doorsteps to be tried.
>
> "The case is not one like a murder case, or something like that, which can have such terrible effects or consequence on the defendants, but I was impressed with the fact that where a transaction took place in New York, or New Jersey, as the Government alleges, and the final, consummation of the sale made in another jurisdiction, if it were possible for people engaging in

this kind of business to set up their operations and engage in it in a friendly community and then if *they could take the position that they could only be charged in that locality and not have to account for their acts all over other portions of the country, it seems to me it would be a very easy matter for them to carry on such illegal operations and never have to pay the penalty therefor.*" (Italics supplied.) (R. 63.)

Petitioners contend that the action of the federal agents in luring Kott into Louisiana for the purpose of holding him, Needleman and Weiner for trial in Louisiana deprived such overt act of the quality it would otherwise have possessed of laying the venue for trial in Louisiana. Forcing petitioners to trial there deprived them of the protection afforded by the United States Constitution, Article 3, Section 2, Clause 3 and the Sixth Amendment.

V.

In answer to petitioners' contention that the trial court committed reversible error in denying petitioners' motion to transfer the proceedings to the Southern District of New York, the Government relies upon *Shurin v. United States,* 164 F. 2d 569 (C. C. A. 4), cert. pending at 521, this term. But in that case there was no showing by the defendant of any reason for a transfer under Rule 21 (b) of the Federal Rules of Criminal Procedure and in the view of the Circuit Court of Appeals which decided *Shurin v. United States* there was serious doubt whether Rule 21 (b) had any application to the case since it appeared that the entire offense had been committed in the district where the trial was had. Here, there can be no doubt that from the indictment it appears "that the offense was committed in more than one district." Therefore, under Rule 21 (b) upon motion of petitioners the Court was compelled to transfer the proceedings to the Southern District of New York if satisfied that such transfer was required "in the interest of justice."

Petitioners assert that the record discloses that the trial court's denial of the motion for transfer was based on his prejudgment of the case and his desire that *they be convicted.* This is apparent from his statement (R. 63), quoted *supra,* pp. 8-9. In support of the motion that in the interest of justice the trial should have been transferred to New York petitioners showed that the following witnesses were available and would testify voluntarily if the trial were held in N. Y.:

(a) Office personnel who observed the negotiations.

(b) Four other persons who saw and heard the negotiations.

(c) Two women guests of John and Pace who were in the hotel rooms during the conference.

(d) The notary public before whom John swore to the facts contained in Affidavit G-2.

(All of the above witnesses are residents of New York, N. Y.)

(e) Five witnesses who would testify to a similar course of conduct on the part of Pace and John in Boston in their endeavor to entrap other persons into the commission of similar offenses.

(f) Another witness to show a similar entrapment in Chicago.

(g) Three witnesses residing in Baltimore, Maryland who would testify to yet another similar entrapment.

(h) Character witnesses residing in New York, who would testify on behalf of petitioner Weiner.

(i) Five witnesses, residents of New York, would testify in support of Weiner's contention that he was absent from New York during the negotiations (R. 31-48).

(j) Three witnesses, employees of a U-Drive-It-Company, from whom the automobile used in the trip to Connecticut was rented, would testify that Weiner did not hire the vehicle (R. 31-42).

Petitioners showed that the above witnesses would testify voluntarily if the trial were held in New York but that the cost of bringing all such witnesses to Monroe, Louisiana for an extended trial would be prohibitive and that such witnesses could not afford to absent themselves and would not voluntarily do so for an extended period of time from their homes and businesses if the trial were held in Louisiana. Petitioners also averred the lack of adequate transportation and hotel facilities (R. 36). There was no countervailing reason for insisting upon trial in Louisiana. Yet the trial court summarily denied the motion, an action dismissed by the Circuit Court as "merely an erroneous exercise of discretion."

The Government in support of the trial court's action states (p. 10 of the Brief in Opposition): "Petitioners were not impecunious defendants who could not afford to pay the expenses of such office personnel as they desired to call, and they manifestly had control of such witnesses." There is nothing in the record to support that statement. And, in any event, the benefits of Rule 21 (b) are not to be denied to all who are "not impecunious defendants." According to a member of this Court's Advisory Committee, the Rules permit transfers in anti-trust cases, where it may be presumed that the defendants are "not impecunious." See N. Y. U. Institute Proceedings, pp. 170-171, 274, 275; cf. *U. S. v. National City Lines*, 7 F. R. D. 393 (D. C. Cal.)

The Government's brief also states "The other witnesses whom they stated they wished to call to testify to alleged entrapments by John upon other occasions were clearly unnecessary, since their testimony would have been irrelevant" (p. 10). The other witnesses referred to by the Government would have been called to testify to further

entrapments *not by John but rather by the same federal agents who entrapped the petitioners.* Clearly proof of such similar entrapments was material and relevant to the issue of whether the federal agents instigated, caused and induced the commission of the acts asserted to be criminal in this case. Even the trial court recognized this and the record shows at least three other instances of entrapments by federal agents in conspiracy with John, the chief government witness.

That the Louisiana trial judge stated he normally limited character witnesses to two is totally irrelevant. In no way does it diminish the harm and prejudice to a defendant who would have been able to call character witnesses had the trial been held in New York.

Finally, the Government brief attempts to justify the clearly erroneous denial by the trial court of the motion to transfer on the assertion that petitioners were benefited "by having their trial in Louisiana, since a major portion of their defenses consisted of attacks on the credibility of John, the Government's chief witness, and the witnesses whom petitioners called on this issue all resided in the region where the trial was had." (pp. 10 and 11). The simple answer to this assertion is that petitioners were compelled to conduct their trial in that manner *because* the trial court's denial of the motion to transfer deprived them of their opportunity to call the numerous the witnesses who would have testified affirmatively in their behalf.

That petitioners were harmfully prejudiced by the denial of their motions to transfer under Rule 21 (b) is amply clear from the Record.

Petitioners repeat that the action of the trial court was clearly a frustration of the purposes intended to be accomplished by the promulgation of Rule 21 (b) and ran counter to the principles enunciated by this Court even prior to the adoption of the Rules of Criminal Procedure. See *Hyde v. Shine,* 199 U. S. 62, 78 and *United States v. Johnson,* 323 U. S. 273, 276. Because there was no proper

basis for it, the Court's denial of the motion under Rule 21 (b), was not "merely an erroneous exercise of discretion" as stated by the Circuit Court of Appeals, but was such reversible error as requires correction by this Honorable Court.

VI.

The Government brief (pp. 12 and 13) also misapprehends the questions brought forward as No. 7 of the petition. Petitioners maintain that the trial court improperly restricted the cross-examination of John, the chief Government witness, in two respects: (a) It was error to cut off the inquiry with regard to John's multifarious illicit activities in Mississippi (R. 220; 265-6). Petitioners had a right to show John in his true colors even if in the process of doing so many details of the "Mississippi mess" (R. 916) might be exposed. Petitioners' right of cross-examination could not be denied upon such an irrelevant collateral consideration. (b) The pre-cross-examination procedure adopted by the trial court was harmfully erroneous. When the trial judge ordered a dress-rehearsal cross-examination of John, preceding his cross-examination in the presence of the jury, he deprived petitioners of the opportunity to accomplish the most fundamental object of such interrogation: to expose the "facts which diminish the personal trustworthiness or credit of the witness." 5 *Wigmore on Evidence,* Section 1368. Petitioners were entitled to have the jury observe the *initial* reaction of the witness to the questions put to him—and petitioners are not now referring (as the Government's brief suggests) to improper questions. The Government brief ignores the fact that in response to admittedly proper questions, John was so shifty, evasive and untruthful that the Court repeatedly found it necessary to admonish him (R. 206; 207; 238; 239; 246; 249; 252-253; 254; 256.) The jury ought to have been permitted to observe the manifest lack of veracity by reason of the witness' own testimony and demeanor. A perusal of John's preliminary cross-examination at the refer-

ences indicated conclusively refutes any thought that he was merely mistaken and supports the charge of deliberate falsehood. As stated by Justice Story in *The Santissima Trinidad,* 7 Wheaton 238, 339, "and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus.* What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses . . . have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases, no court of justice could venture to rely on it, without danger of being betrayed into the grossest errors." It is submitted that as a result of the trial Court's action, sanctioned by the Circuit Court of appeals, the *jury* was "betrayed into the grossest" error.

VII.

The Government's brief (p. 14) seeks to support the action of the trial court in quashing petitioners' subpoena directing the production of John's books on the ground that "the ruling was in line with the judge's efforts on the cross-examination of John to keep collateral issues within reasonable bounds, and was clearly proper." This is indeed a unique misapplication of Rule 17 (c), the entire purpose of whch is to permit *discovery.* Relevancy was not even then before the Court. Petitioners had a right to inspect these books. Whether, what they found would be admissible was a question which would not be reached until after discovery and upon proffering the facts learned in the evidence.

In any event, there was no showing that "compliance would be unreasonable or oppressive" and, therefore, the Court's ruling was erroneous and expressly in violation of Rule 17 (c). This was prejudicial error and in violation of petitioners' fundamental right to produce evidence

in their own behalf, the very minimum requirement of due process.

VIII.

Petitioners repeat that this is a case which eminently deserves review by this Honorable Court. Apart from the serious constitutional questions which are raised, the lower court's rulings on the application of the Rules of Criminal Procedure 21 (b) and 17 (c) are challenged. It is submitted that the importance of the questions affecting the administration of federal criminal law here presented calls for the exercise of this Honorable Court's supervisory power over federal criminal prosecutions under the rule of *McNabb v. United States,* 318 U. S. 332.

Respectfully submitted,

DAVID BERGER,
JOHN W. BOHLEN,
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Counsel for Petitioners, Israel Needleman and Harry Weiner.
LOUIS HALLE,
Counsel for Petitioner, Irwin Kott.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 532

IRWIN KOTT, ISRAEL NEEDLEMAN, AND HARRY WEINER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1319–1326) is reported at 163 F. 2d 984. The opinion of the district court denying petitioners' motions for judgments of acquittal appears at pages 770–786 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered October 23, 1947 (R. 1326). A petition for rehearing was denied November 19, 1947 (R. 1338). On December 13, Mr. Justice Black

extended petitioners' time to file a petition for a writ of certiorari to January 18, 1948 (R. 1338), and the petition was filed on January 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioners were entrapped into committing the offense charged.

2. Whether it was proper, to meet the defense of entrapment, to permit the Government to introduce evidence of statements by a person purportedly representing petitioners' firm.

3. Whether petitioners' motions for change of venue were properly denied.

4. Whether it was proper for the trial judge to conduct a hearing outside the presence of the jury to determine the permissible scope of the cross-examination of the Government's chief witness.

5. Whether a subpoena to examine all the records of the business of the Government's chief witness, not relating to the offense charged, was properly quashed.

6. Whether the conduct of the trial judge was proper.

STATEMENT

A four count indictment, charging substantive violations of the Emergency Price Control Act,

and conspiracy to violate the Act in the sale of liquor at over-ceiling prices, was returned against petitioners and one Semel in the United States District Court for the Western District of Louisiana (R. 8–21). Petitioners were convicted on count 3 charging an unlawful sale, and on count 4, the conspiracy count (R. 10–21, 1268). On Count 4, petitioner Kott was sentenced to imprisonment for a year and a day, and petitioners Needleman and Weiner to imprisonment for 6 months and to pay a fine of $10,000. Imposition of sentence was suspended as to all the petitioners on count 3, and petitioners were placed on probation for a period of five years. (R. 1284–1290.) On appeal the judgments were affirmed (R. 1326).

The evidence for the Government may be summarized as follows:

In the spring of 1945, a man named Hillman asked one Comell John whether he would be interested in purchasing Meadville whiskey at $65 per case, about $23.50 above the ceiling price (R. 110–111, 114–115).[1] John said that he was not interested because the price was too high (R. 115). However, Hillman left with John a card bearing the name and telephone number of Distillers Factors Corporation, and told him to

[1] John admittedly engaged in the liquor business in Mississippi (R. 108, 310), although the liquor traffic is officially outlawed in that state (see R. 377). He bought liquor through the John's Beverage Company of Tallulah, Louisiana, a firm in his wife's name (R. 108, 341; see R. 233, 236, 238–239).

get in touch with that firm should he become interested later (R. 115). John reported this conversation to Pace, an investigator of the Alcohol Tax Unit (R. 116).

In July 1945, John called the office of the Distillers Factors Corporation and asked for Mr. Hillman. A man, who identified himself as Kott, said that Hillman was not there but that he would do just as well. John asked about the whiskey he had discussed with Hillman. Kott replied that he could not give any prices over the telephone, but suggested that John come to New York. (R. 117–119.)

John, a friend of his named Patterson, and Pace, the Alcohol Tax Unit investigator, arrived in New York on August 6, 1945 (R. 119, 601, 623). After their arrival, John was confined to bed for a few days because of a knee injury (R. 119–120, 602, 654). He called Distillers Factors and told Kott that he could not come down to the office because of his injury. Kott said that, while it was not their usual custom to do business in a hotel room, under the circumstances he would visit John. (R. 120–121.)

Kott, Needleman and Weiner came to John's hotel room that evening (R. 121, 602). Patterson was present at the meeting (R. 121, 124, 602). They discussed the sale of Meadville whiskey and quoted John a price of from $63.50 to $65.00 per case. John said he was not interested. No

agreement was reached that evening. (R. 123, 603.)

The next morning, while Pace was talking to John and Patterson, Kott arrived unexpectedly (R. 125, 603, 657). John introduced Pace as "Mr. Hennigan," his sales manager (R. 125, 604, 657). Kott said that they had decided to let John have the whiskey at $60 per case—$37.97, the ceiling price, to be paid by letter of credit to United Distillers; $2.00 brokerage fee by check to Distillers Factors; and the balance in cash of denominations of $100 or less (R. 125–126, 604, 657). Kott said that he had to leave town and that Needleman and Weiner would complete the deal (R. 126, 657).

John arranged to get a letter of credit, payable to Capitol National Bank at Hartford (R. 129, 396–397), and had his wife wire him $11,000, which he changed to bills of small denominations (R. 129–130, 663).

A few days later, Pace and John went to the office of Distillers Factors, and saw Needleman and Weiner there (R. 126–127, 658). John inquired about Hillman, and Needleman said that Hillman was no longer with them, having failed to turn over money he had collected (R. 127–128). Weiner called the distillery to make arrangements for the delivery of the whiskey, but since John's letter of credit had not yet arrived, no definite plans were made (R. 130–132).

On the following Monday or Tuesday, John and Weiner, representing Distillers Factors, signed a letter by which John agreed to pay Distillers Factors a brokerage fee of $2.00, to be considered as part of the 15 percent mark-up allowed wholesalers by O. P. A. (Gov. Ex. G–2, R. 135, 139–140). John also signed a statement to the effect that no other consideration had been promised or paid to Distillers Factors (Gov. Ex. G–5, R. 137–138, 184–186).

On August 14, John, Pace, and Needleman drove to Connecticut to the distillery of United Distillers (R. 141–142, 664), a firm owned by the co-defendant Semel, who was acquitted (R. 593, 1268). It was discovered that the whiskey could not be shipped that day, and John stated that he would not pay the money until the whiskey was delivered (R. 144–149, 671–672).

John and Pace returned to New Orleans (R. 149). Later in the month, John wired Distillers Factors that he was still interested in the whiskey (R. 149–150). In response to the wire, Needleman called and said that they would load the whiskey but that there would have to be changes in the letter of credit (R. 150). Arrangements were made for such changes (R. 150, 408–412). Needleman also said that Kott would come to Mississippi to collect the cash payment (R. 150).

Kott arrived at Jackson, Mississippi, on September 7 (R. 150). John told him that he would

have to go to Tallulah, Louisiana, the office of John's Beverage Company, to get the check representing the brokerage fee, and that the cash would be paid there (R. 151). Kott said that he would not let the whiskey come through until he received the money, and John said that he would not pay the money until he had evidence that the bill of lading had been surrendered to the bank (R. 154).

John arranged with the Alcohol Tax Unit investigators to take down the serial numbers of the money he intended to give Kott, and then he deposited the money in the safe of the John's Beverage Company (R. 164–165, 630–632, 673).

The next day, John and Kott drove to the office of the John's Beverage Company in Louisiana (R. 165). John gave Kott the money but refused to let him leave the office until they received word that the bill of lading had been surrendered (R. 166–167). About noon, word was received that the bill of lading had been surrendered against the letter of credit (R. 170).

Kott and John then left the office. John gave the Alcohol Tax Unit investigators, who were waiting, a prearranged signal indicating that the transaction had been completed. (R. 171–172, 634, 680.) On the way from Tallulah, Louisiana, to Vicksburg, the Alcohol Tax Unit investigators stopped the car and arrested Kott (R. 172, 635). They found on his person the money paid to him

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by John, the serial numbers of which corresponded with the numbers they had previously taken down (R. 636).

ARGUMENT

1. As is usual in situations where government agents observe the unfolding of an offense in an undercover capacity, petitioners strongly urge (Pet. 11–12, 14, 17–24) that they were entrapped into committing the offense charged. The facts, as set forth in the Statement, *supra*, are a sufficient answer to this contention. This is not a case in which "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, 287 U. S. 435, 442. In response to a telephone call asking about the price of whiskey, petitioners suggested that John come to New York. In response to his call from New York, they came to his hotel room and discussed the sale of whiskey. When he asserted that their price was too high, they came down in their price. These were no innocent persons instigated to illegal action; these were illegal operators who "acceded without hesitation and as a matter of course" to an offer to purchase. *Casey* v. *United States*, 276 U. S. 413, 419. The issue of entrapment was submitted to the jury on full and proper instructions (R. 1236–1239, 1257), and on ample

evidence, the jury resolved that issue against petitioners.

2. In this connection, it is immaterial whether Hillman was or was not an agent of petitioners[2] or a co-conspirator with John to render admissible the testimony in regard to Hillman's offer to John and John's statement to Pace about that offer (see Pet. 13, 19–20, 30–32). Faced with the defense of entrapment, the Government had the right to show reasonable grounds for suspicion that the accused were predisposed to commit the offense. *Sorrells* v. *United States,* 287 U. S. 435, 451. The challenged evidence was directly relevant to that issue and was expressly admitted for that purpose by the trial judge (R. 111–112, 650). Its admission was therefore clearly proper. See *Weathers* v. *United States,* 126 F. 2d 118 (C. C. A. 5), certiorari denied, 316 U. S. 681; *United States* v. *Becker,* 62 F. 2d 1007, 1008–1009 (C. C. A. 2).

3. Petitioners contend that it was an abuse of discretion to deny their motions for a change of venue, on the ground that, in their affidavits in support of the motions, they had made a sufficient showing of the necessity for such change

[2] Hillman's agency for petitioners at the time he made the offer to John was in fact established, not only by Hillman's own statements to that effect, but by Kott's willingness to talk with John at the time of his first telephone call asking for Hillman (R. 117–118), and by the admissions of Weiner and Needleman that Hillman had been their representative (R. 127–128).

(Pet. 14–15, 25–30), and on the further ground that they had been lured into committing an overt act in the State of Louisiana where the prosecution was brought (Pet. 12–14, 24–25).

In their motions for change of venue, petitioners asserted that they were residents of New York, that the major negotiations had taken place in New York, and that they desired to call witnesses who would testify voluntarily in New York, but who would not come to Louisiana. Among the witnesses whom they stated they intended to call were office personnel of Distillers Factors, persons involved in other transactions in which John had given information to the government investigators, and character witnesses. (R. 30–39.) We think it is clear that the trial judge committed no abuse of discretion in denying the motion on such showing. Petitioners were not impecunious defendants who could not afford to pay the expenses of such office personnel as they desired to call, and they manifestly had control of such witnesses. The other witnesses whom they stated they wished to call to testify to alleged entrapments by John upon other occasions were clearly unnecessary, since their testimony would have been irrelevant. As to character witnesses, the trial judge stated he normally limited such witnesses to two (R. 65).

In actual effect, petitioners benefited by having their trial in Louisiana, since a major portion of their defense consisted of attacks on the credibility of John, the Government's chief witness,

and the witnesses whom petitioners called on this issue all resided in the region where the trial was had (R. 907, 927–928, 941–942, 945–949). They also examined the books of the John's Beverage Company in Louisiana and had a witness testify to the result of that examination (R. 957–982). These witnesses obviously had a more direct relationship to the issues in the case, than those whom petitioners proposed to call. Petitioners are thus in no position to claim prejudice by the denial of their motions for a change of venue, and thus are in no position to claim reversible error. See *Shurin* v. *United States,* decided November 10, 1947 (C. C. A. 4), certiorari pending, No. 521 this Term.

As to their contention that they were lured into committing the offense in Louisiana, it should be noted at the outset that petitioners were not lured into committing an offense in the south. The illegal sale to John was not completed in New York or Connecticut because petitioners were not in a position to make delivery at the time of John's visit. Kott made the visit south for the specific purpose of completing the sale which petitioners had not previously been able to complete. It may be that Kott expected to complete the transaction in Mississippi rather than Louisiana, but he and the other petitioners whom he represented certainly intended to commit an offense in the south.

There was good reason why John should have wished to complete the transaction in Louisiana rather than in Mississippi. His wife's concern was making the purchase and was paying by check a brokerage fee, apparently regarded as legitimate. Throughout, John evinced a desire to keep the part of the transaction involving his wife's firm on a legitimate level, and it was natural that he would wish the legitimate transactions to take place in Louisiana rather than in Mississippi, where the liquor traffic was outlawed. (R. 383–384, 390.) That the Alcohol Tax Unit investigators may also have preferred to have the cash representing the illegal purchase price transferred in Louisiana, rather than in Mississippi, thus becomes immaterial.

4. Petitioners' objections to the procedure adopted by the trial judge in conducting a preliminary hearing to determine the proper scope of their cross-examination of John (Pet. 13, 32–34) are unjustified. At the outset of John's cross-examination, one of petitioners' counsel started asking John about his mother's business, a matter which certainly seemed to be irrelevant (R. 187–188). In the course of the discussion, which followed out of the presence of the jury, it became evident that petitioners' counsel intended to raise many collateral issues of doubtful propriety (R. 189–191, 196–198), and the trial judge stated that he wanted to "thrash it all out" before the jury was

brought back (R. 191). He then adopted the procedure of having John cross-examined outside the presence of the jury to determine what questions would be admissible (R. 202–203). In the course of that preliminary hearing, the judge frequently had occasion to limit or eliminate proposed questions (R. 205, 211, 215, 220, 221, 226, 229–230, 231, 237, 247–248, 251–252, 256, 258–260). Time and again the judge pointed out how the proposed cross-examination would lead into collateral issues not germane to the issues in the case (R. 220, 222, 237, 251–252, 256, 258). The court then made its ruling on the proper extent of cross-examination (R. 262–263).

Petitioners do not attack the propriety of the judge's final ruling, but contend merely that they were denied a fair trial because the jury was unable to hear John's first reactions to their questions. Since, however, so many of their questions were improper, it can hardly be said that the jury was deprived of opportunity to hear proper testimony. Furthermore, if petitioners' theory were correct, every preliminary hearing on the admissibility of a confession would deprive a defendant of a fair trial.

The proper scope of examination is a matter peculiarly within the discretion of the trial judge. *Glasser* v. *United States,* 315 U. S. 60, 83. The procedure he adopted to assure proper cross-examination was well within his authority as presid-

ing officer of the court. See *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95.

5. Petitioners also contend (Pet. 13, 35) that it was error to quash their subpoena directing the production of John's books relating to all his operations in Mississippi (see R. 372–382). The judge did allow petitioners to subpoena the books of the John's Beverage Company, the company to whom the liquor involved in this prosecution was sold, in order to enable them to establish that John was operating that company in his wife's name (R. 509, 513), but stated that he thought that the question of the amount of John's business in Mississippi, etc., would go into collateral matters that had no real bearing on credibility (R. 372–382). The ruling was in line with the judge's efforts on the cross-examination of John to keep collateral issues within reasonable bounds, and was clearly proper.

6. Petitioners' attack on the conduct of the trial judge (Pet. 13, 36–41) is so obviously without merit as hardly to require comment. The very references which petitioners give to alleged improper conduct (Pet. 36-37) show that the judge was doing no more than exercising his function to conduct the trial in an orderly manner and get the relevant facts before the jury. *United States* v. *Gross*, 103 F. 2d 11, 13 (C. C. A. 7); *United States* v. *Breen*, 96 F. 2d 782, 784

(C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States,* 25 F. 2d 258, 259 (C. C. A. 8); *Kettenbach* v. *United States,* 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613. His questioning of witnesses was in fact very limited. His charge contained a full summary of the evidence on both sides (R. 1235–1245) and the passages which petitioners attack as prejudicial (Pet. 39–40) in themselves show balance and impartiality.

As to petitioners' contention that the judge failed to instruct the jury about the regulations governing sales to retailers (Pet. 37–38), it is clear from document that petitioners themselves had John sign (Gov. Ex. G–2, see Statement, *supra,* p. 6) that they were making the sale as one to a wholesaler. In any event, the price they charged was so clearly over the ceiling that it would make no difference whether the sale was to a wholesaler or a retailer.

As to the judge's refusal to give petitioners' requested charge that, since John was an informer, his testimony should be examined with greater care than the testimony of an ordinary witness (R. 1214, see Pet. 38–39), the simple answer is that such is not the rule in regard to informers. *Smith* v. *United States,* 17 F. 2d 723, 724 (C. C. A. 8), certiorari denied, 274 U. S. 762.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1948.

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IN THE

Supreme Court of the United States.

No. 532. OCTOBER TERM, 1947.

IRWIN KOTT, ISRAEL NEEDLEMAN AND HARRY WEINER,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

Your petitioners, IRWIN KOTT, ISRAEL NEEDLEMAN and HARRY WEINER respectfully represent as follows:

1. On January 17, 1948 their petition for certiorari to the Fifth Circuit Court of Appeals which affirmed their convictions for violation of the Emergency Price Control Act (56 Stat. 33 as amended), and conspiracy to violate it (35 Stat. 1096), was filed. On February 16, 1948 certiorari was denied by this Honorable Court.

2. After the petition for certiorari was filed this Honorable Court decided *United States v. Johnson* (decided February 2, 1948) and granted rehearing and certiorari in *Lustig v. United States* (#1389, October Term, 1946).

3. Upon reconsideration of the opinion of the court below,[1] in the light of *United States v. Johnson, supra; United States v. Di Re* (decided January 5, 1948) and the action of your Honarable Court in granting certiorari in *Lustig v. United States, supra;* and *Trupiano v. United States* (#427, October Term, 1947; cert. granted December 15, 1947), petitioners urge that there exists an important question requiring review by this Honorable Court: whether damaging evidence, part and parcel of the founda-

[1] The Court's opinion is somewhat confusing in that, simultaneously, it dismissed as interlocutory petitioners' appeal from the denial of their Motion to Suppress evidence obtained by means challenged as an illegal search and seizure (R. 1320), and passed thereon, holding the arrest, search and seizure legal (R. 1321; 1326).

tion of petitioners' convictions, was inadmissible and ought to have been suppressed because it was obtained through and by means of an unconstitutional search and seizure.

4. While riding in an auto driven by an informer acting in cooperation with federal agents, in accordance with prearranged plan, your petitioner Kott was arrested without a warrant in Louisiana by investigators of the Alcohol Tax Unit. He was not informed by the arresting officers of the cause of his arrest (R. 172, 635, 636). The federal agents searched him and seized from his person $7,120.00 in marked currency (R. 636). Petitioners' Motion to Suppress the evidence thereby obtained was denied (R. 1320).

5. Said search of petitioner Kott and seizure of the $7,120.00 was in violation of the provisions of the United States Constitution, Fourth Amendment, in that the arrest without warrant was invalid because the arresting officer failed to comply with the provisions of the state law governing the arrest (*United States v. Di Re, supra; United States v. Johnson, supra*). Article 70 of the Code of Criminal Law and Procedure of the State of Louisiana, applicable to the arrest, provides as follows:

> "70. Arrest without warrant—Duties of officer—Prima facie evidence of performance.—When arresting a person, without a warrant, *the officer making the arrest shall inform the person arrested of his authority and the cause of the arrest,* except when the person arrested is engaged in the commission of a criminal offense, or if he flees or if he forcibly resists arrest before the officer has time to inform him. The return of the officer making the arrest, indorsed upon the warrant upon which the accused person shall be subsequently held, affirming compliance with the provisions herein, shall be prima facie evidence of the fact in the trial of any criminal cause." (Emphasis added.)

There is no evidence in the record that the officer or officers making the arrest informed petitioner Kott of the cause

of the arrest (R. 172; 635, 636). Petitioners' Motion to Suppress gave the Government clear notice (unlike in the *Di Re* case) that petitioners challenged the validity of the arrest. And, since the Government failed to prove that petitioner Kott was informed of the cause of the arrest,[2] it must be concluded, as a matter of law, that the arresting officer did not "inform the person arrested of . . . the cause of the arrest." Consequently, the arrest was illegal under Louisiana law and the search and seizure invalid under federal law.[3] Petitioners' convictions should, therefore, be reversed.[4]

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[2] Investigator Barlow, an arresting officer, in his direct examination, gives a detailed description of the acts which occurred and the statements made during the arrest and the subsequent taking of Kott to the Tallulah, Louisiana police station (R. 635, 636). In his cross-examination, he again describes the arrest (R. 638). Nowhere does he say that he informed Kott of the cause of the arrest.

[3] The Circuit Court of Appeals justified the arrest upon the ground that through John's "cooperation" with Pace, a federal agent, Pace (not the arresting officer) "had been kept fully conversant with the progress of the matter by John" (R. 1326). Assuming such facts, the failure of the arresting officer to have obtained the necessary warrants beforehand becomes inexcusable.

[4] While this petition, in compliance with Rule 33 of this Honorable Court, is restricted to the grounds above specified, your petitioners respectfully submit that the denial of their petition for certiorari sanctioned the admission of damaging hearsay statements of John, an informer, erroneously thought by both lower courts to be a co-conspirator of petitioners, though in fact (as said by the Circuit Court of Appeals) at all times he "was acting in cooperation with Pace and the federal agents" (R. 1326) and of one Hillman, said by the lower court to have been a co-conspirator of John (R. 1325). The effect of the court's denial of the certiorari is thus to sanction a practice in direct conflict with the decision of *Fiswick v. United States*, 329 U. S. 211 and the reasoning of *Blumenthal v. United States*, 92 L. ed. 183, 190, 191. Similarly, the denial of certiorari sanctioned, under the guise of an "erroneous exercise" of discretion

WHEREFORE your petitioners respectfully pray that rehearing be granted, that the order filed February 16, 1948, denying certiorari be vacated, and that certiorari be granted.

And your petitioners will ever pray, etc.

Respectfully submitted,

DAVID BERGER,
JOHN W. BOHLEN,
THOMAS D. MCBRIDE,
Counsel for Petitioners, Israel Needleman and Harry Weiner.

LOUIS HALLE,
Counsel for Petitioner, Irwin Kott.

We hereby certify that this Petition is presented in good faith and not for delay and that it is restricted to substantial grounds available to petitioners although not previously presented.

DAVID BERGER,
JOHN W. BOHLEN,
THOMAS D. MCBRIDE,
Counsel for Petitioners, Israel Needleman and Harry Weiner.

LOUIS HALLE,
Counsel for Petitioner, Irwin Kott.

(R. 1323) a palpable violation of Rule 21 (b) as well as a prejudicially harmful misapplication of Rule 17 (c) of the Rules of Criminal Procedure. Therefore, it is respectfully urged that if this petition be granted, certiorari be made broad enough to permit review of these rulings as well, though such errors are not relied upon herein as grounds for rehearing.